United States Court of Appeals

for the Second Circuit

APPENDIX

75-7507

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT CUTMORE, Plaintiff-Appellant	)	Docket No. 75-7507
v.	)	
PLAZA INVESTORS HOLMDEL CORPORATION AND HAROLD LEWIS, Defendant-Appellees	)	December 15, 1975

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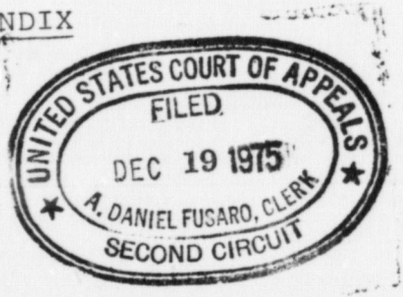
APPEAL FROM DISTRICT COURT

APPENDIX



VICTOR M. FERRANTE, ESQ.
Attorney for Appellant
285 Golden Hill Street
Bridgeport, Connecticut
06604

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RELEVANT DOCKET ENTRIES

3/15/74	Complaint filed.
4/25/74	Answer and Special Defense filed.
6/10/74	Court Trial Commences and Completed before Moore, J., Sitting by designation.
6/24/75	Amended Answer and Special Defense filed.
7/29/75	Memorandum and Order filed and entered.
7/29/75	Judgment filed and entered in favor of defendants.
8/27/75	Plaintiff's Notice of Appeal from final judgment filed.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT CUTMORE	)	CIVIL ACTION
	)	
Plaintiff	)	NO. B-74-85
	)	
vs.	)	BRIDGEPORT
	)	
PLAZA INVESTORS HOLMDEL CORP. and HAROLD LEWIS	)	
	)	
Defendants	)	MARCH 14, 1974

COMPLAINT

1. The Defendant PLAZA INVESTORS HOLMDEL CORP. is a corporation organized and incorporated under the laws of the State of New York, having a principal place of business at 999 Central Avenue, Woodmere, County of Nassau, State of New York.

2. The Defendant HAROLD LEWIS is a citizen of the State of New York residing also at 999 Central Avenue, Woodmere.

3. The Plaintiff is a citizen of the State of Connecticut. The matter in controversy exceeds ten thousand dollars, exclusive of interests and costs.

4. On or about March 15, 1972, plaintiff, as an employee of Engineered Systems Corp., was working in a structure being erected on property owned and controlled by the two defendants in Ridgefield, Connecticut on the westerly side of Connecticut highway Route #35, said structure being part of a development developed, owned and controlled by the defendants and known as COPPS HILL PLAZA.

5. Both the individual and the corporate defendant, although citizens of the State of New York, were doing business in the State of Connecticut and were developing COPPS HILL PLAZA SHOPPING CENTER on the westerly side of Connecticut highway Route #35 in Ridgefield, Connecticut.

6. The corporate defendant purchased the land on which the COPPS HILL PLAZA development was later built on December 16, 1969. Thereafter, the corporate defendant leased interests in said land and in the structure or structures to be built thereon to various retail and other business establishments.

7. Subsequent to these store leases, the corporate defendant conveyed the land on December 16, 1971 to the individual defendant HAROLD LEWIS by a Quit Claim Deed, executed by HAROLD LEWIS as President of PLAZA INVESTORS HOLMDEL CORPORATION. Said Quit Claim Deed was recorded in Volume 156, Page 583 of the Ridgefield Land Records. No conveyance tax was paid to the State of Connecticut on said conveyance.

8. On or about March 15, 1972, plaintiff along with other employees of Engineered Systems Corp. was working in an area under the roof of said structure, and was preparing that area for the installation of a ceiling. His working area was at a considerable height above the floor of the defendants' building, and it was therefore necessary for the defendant and his co-employees to have a scaffold to stand on in doing their work.

9. Plaintiff, his foreman and another employee were each working on the top decks of rolling metal rail scaffolds

moving them about on the concrete floor of defendant. ' premises in order for each of them to work on different areas of the ceiling.

10. While plaintiff was so working, one of the legs of the scaffold he was employing dropped into a hole in the concrete floor causing the entire scaffold to tip and the planks on which plaintiff was standing to slip. This in turn caused plaintiff to fall and to jump clear from the falling planks and scaffold. Consequently plaintiff himself landed on the concrete floor on his right heel and fractured that right heel.

11. The fall sustained by the plaintiff and the subsequent injuries he sustained were caused by the negligence of the defendants in that:

a. defendants knew that employees were working in defendants' structure in and around said concrete floor and using rolling scaffolds on that floor.

b. defendants knew the condition of said concrete floor and knew that there were uncovered holes in that floor.

c. despite such knowledge of the condition of the floor and of workmen working on it, nonetheless defendants caused and permitted such holes to remain open and unprotected; defendants failed to cover the holes or place any protective barrier around them.

12. A a result of the fall caused by the negligence of the defendants as aforesaid plaintiff sustained serious injury to his body and severe shock and injury to his nervous system; he experienced great physical and mental pain and suffering; he sustained a fracture to his right heel.

13. Said injuries and pain and suffering are permanent, and have resulted in permanent disability to plaintiff.

14. As a further result of this fall caused by defendants' negligence, plaintiff was forced to expend and will in the future be forced to expend large sums for medical, surgical and hospital care and attention.

15. As a further result of his injuries plaintiff was unable to engage in his usual occupation as a carpenter for a long period of time, and as a result of the permanent disability suffered will not in the future be able to perform that occupation, all to plaintiff's further damage and loss of earning capacity.

WHEREFORE PLAINTIFF PRAYS JUDGMENT AGAINST THE DEFENDANTS FOR ONE HUNDRED THOUSAND ($100,000.00) DOLLARS FOR COSTS OF SUIT AND FOR SUCH OTHER AND FURTHER RELIEF AS TO THE COURT MAY SEE PROPER.

THE PLAINTIFF

s/JOHN A. ARCUDI

JOHN A. ARCUDI
285 Golden Hill Street
Bridgeport, Connecticut 06604

UNITED STATES DISTRICT COURT
for the

DISTRICT OF CONNECTICUT

ROBERT CUTMORE,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No. B 7485
	)	
PLAZA INVESTORS HOLMDEL CORP. and HAROLD LEWIS,	)	
	)	
	)	
Defendants	)	April 24, 1974

ANSWER AND SPECIAL DEFENSE

ANSWER:

1. Paragraphs 1, 2, 5, 6 and 7 are admitted.

2. As to Paragraphs 3, 4, 8, 9, 10, 12, 13, 14 and 15, these defendants have no knowledge or information sufficient to form a belief, and therefore leave the plaintiff to his proof.

3. Paragraph 11 is denied.

BY WAY OF SPECIAL DEFENSE:

The defendants were in the position of being the principal employer of the plaintiff, and therefore the plaintiff is barred from maintaining this section under the General Statutes of the State of Connecticut.

THE DEFENDANTS,

BY Gregory C. Willis
Gregory C. Willis
of
Willis and Willis
955 Main Street, Bridgeport, Conn.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT CUTMORE		
	Plaintiff	Civil No. B-74-85
VS.		
PLAZA INVESTORS HOLMDEL CORP. AND HAROLD LEWIS		
	Defendants	June 23, 1975

AMENDED ANSWER AND SPECIAL DEFENSE

ANSWER:

1. Paragraphs 1, 2, 5, 6 and 7 are admitted.

2. As to Paragraphs 3, 4, 8, 9, 10, 12, 13, 14 and 15, these defendants have no knowledge or information sufficient to form a belief, and therefore leave the plaintiff to his proof.

3. Paragraph 11 is denied.

FIRST SPECIAL DEFENSE:

The defendants were in the position of being the principal employer of the plaintiff, and therefore the plaintiff is barred from maintaining this action under the General Statutes of the State of Connecticut.

SECOND SPECIAL DEFENSE:

If the plaintiff, Robert Cutmore, sustained the injuries

and damages in the manner and to the extent as alleged in his complaint, said injuries and damages were proximately caused by his own negligence in that he failed to keep a proper look-out; and in that he moved the scaffolding on which he was standing without property determining if that movement could be made in safety, even though he knew or should have known that there were concrete holes in the floor in the area where he was moving the scaffolding.

THE DEFENDANTS, Plaza Investors
Holmdel Corp. and Harold Lewis

By David J. Sullivan, Jr.
David J. Sullivan, Jr.
of Willis and Willis
955 Main Street, P.O. Box 1109
Bridgeport, Connecticut 06604

C E R T I F I C A T I O N

This is to certify that a copy of Amended Answer and Special Defense was mailed on June 23, 1975, via U.S. Mail. Postage Prepaid, to: John A. Arcudi, Esquire, 285 Golden Hill Street, Dated June 23, 1975.

David J. Sullivan, Jr.
David J. Sullivan, Jr.

MOORE, Circuit Judge*: MEMORANDUM AND ORDER

Plaintiff, a citizen of Connecticut, a carpenter by trade, brings this action against Plaza Investors Holmdel Corp., (Holmdel), incorporated under the laws of New York with a principal place of business in Woodmere, New York, and Harold Lewis, a citizen of New York, for personal injuries sustained by him as a result of defendants' alleged negligence. The amount in controversy is alleged to be in excess of $10,000. Jurisdictional requirements are satisfied.

At the time of the accident, March 15, 1972, plaintiff was employed by Engineered Systems Corp. (Engineered) and was working in a structure being built as part of a shopping center in Ridgefield, Connecticut. Plaintiff's work was in connection with the installation of an accoustical or suspended ceiling which required him to stand on a scaffold some distance above a concrete floor. The scaffold was of a metal rail type on wheels so that the workman could propel himself from place to place while working.

Plaintiff bases his claim against defendants on the theory that he was performing work on "property owned and controlled by the two defendants". (Complaint, par. 4). Ownership and control are alleged to arise out of the acquisition of the property on December 16, 1969 by the corporate defendant (Holmdel), the leasing

*Sitting in the District Court for the District of Connecticut by designation.

by that defendant of structures to be built thereon to various business establishments, and the conveyance of the land on December 16, 1971 to defendant Harold Lewis. These facts of ownership are admitted.

Plaza Investors Corp. (Investors) is a corporation engaged in construction work and at the time of the accident was performing work in the particular job on which plaintiff was working as an employee of a sub-contractor, Engineered. Harold Lewis was President of Investors as well as Holmdel, and he was the sole stockholder in each corporation. He thus controlled both corporations and used Investors for the construction work. Plaintiff's assertion of liability against Holmdel is based upon a lease it had made with the W. T. Grant Company for the building on which plaintiff was working. This lease was made during the period of Holmdel's ownership and prior to the transfer of the land to Lewis.

According to Lewis, Holmdel engaged Investors to construct the shopping center by an oral agreement. Lewis, however, has described his role as "generally in charge of the development process." As president and chief executive officer he also directed both corporations. Thus any oral agreement would appear to have been an agreement with himself but in different presidential capacities.

The immediate cause of plaintiff's injury is clear. While Cutmore was standing on a plank on the scaffold about ten feet above the floor, the scaffold suddenly tipped causing the plank to slip and plaintiff to fall. In an attempt to save himself and to

avoid the falling planks, he jumped to the floor, fracturing his right heel.

There was testimony that, due to the unfinished condition of the building, there were a series of square holes in the concrete floor which had been left uncovered to allow further work in the apertures. Witnesses estimated these holes as between 15 and 18 inches in lineal measurement and approximately 12 inches in depth. From these facts a finding can be made with reasonable certainty that one of the wheels of the scaffold fell into one of these holes while plaintiff was propelling himself from one work area to another. A fellow employee working nearby observed the position of the scaffold just after its collapse and no other explanation was offered.

Plaintiff knew that there were holes in the floor because he had worked in the area previously and on the particular job for a day and a half. However, up on the scaffold he did not know at every minute where every hole might be.

Upon the basis of these facts to what extent, if any, are defendants liable and if so, what damages has plaintiff sustained?

It is clear that on the day of the accident, March 15, 1972, Lewis was the sole owner of the premises. Other facts are equally clear: plaintiff was an employee of Engineered; Engineered had a contract with Investors to perform work on the ceiling on which work plaintiff was engaged at the time of the accident; Investors was the general contractor for the construction job and had been engaged for this purpose by Lewis and or Holmdel.

At the opening of the trial defendants sought leave to file an amended answer and special defenses. Leave was granted so that the pleadings might be in conformity with whatever proof might be adduced in support thereof. As a "First Special Defense" defendants pleaded the "Principal Employer Defense," Connecticut General Statutes, Section 31-291 (Workmen's Compensation Act). This defense had been raised prior to trial in defendants' Memorandum of Law and, in effect, limits recovery to statutory compensation.

Section 31-291 provides:

> When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, or or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if work were done without the intervention of such contractor or subcontractor.

In King v. Palmer, 129 Conn. 636, 30 A.2d 549 (1943) the Supreme Court of Connecticut said:

> In order to come within the provisions of this statute, three things must be shown:
> (1) the relation of principal employer and contractor must exist in work wholly or in part for the former;
> (2) the work must be on or about premises controlled by the principal employer;
> (3) the work must be a part or process in the trade or business of the principal employer.
>
> 30 A.2d at 551.

If, by hypothesis, Lewis is to be held the principal employer the first two conditions are satisfied. On the same hypothesis the question arises whether the work being performed was "a part or process in [his] trade or business." Were Investors a defendant there would be no doubt that under section 31-291 it would be a principal employer and protected by the statute--but it is not. Undoubtedly to by-pass the statute plaintiff elected not to sue Investors.

Turning to Connecticut law for guidance, we find that question of "trade or business" is largely dependent on the particular factual situation involved. In Hoard v. Sears Roebuck and Co., Inc., 122 Conn. 185, 188 A. 269 (1936) the injured plaintiff was an employee of Hathaway who had been hired by Sears to remove rubbish from Sears' premises. The plaintiff there (as here) had received compensation from its immediate employer, Hathaway. At trial, a verdict was directed in favor of Sears on the grounds that Sears could assert the principal employer defense. On appeal the plaintiff claimed that Sears was not the principal employer. However the Supreme Court affirmed the judgment holding that the removal of rubbish was a part of Sears' business and hence Sears came within the statutory criteria set for a "principal employer."

Subsequently in 1943 in King v. Palmer, supra, the injured plaintiff was an employee of the F & B Company which had been hired by the defendant, a manufacturing plant, to perform major electrical repair work in the defendant's plant. There, as here, the employee had received workmen's compensation from his immediate

employer. However, the Supreme Court concluded that the defendant was not equipped to do major repair work and held, therefore, that the plaintiff was not doing work which might be regarded as a part of the defendant's business--hence section 31-291 was not a bar to recovery by plaintiff against the owner of the plant, Palmer.

More recently, 1963, in Gigliotti v. United Illuminating Co., 151 Conn. 114, 193 A.2d 718, heavily relied on by plaintiff, an employee of a sub-contractor was injured while working on premises owned by the defendant. The sub-contractor was engaged in dusting and cleaning a generating station cubicle. Upon the facts there presented the Supreme Court held that the work being performed was not a part of the business of the defendant--hence section 31-291 did not apply.

To the opposite effect appears to be Kasowitz v. Mutual Construction Company, 154 Conn. 607, 228 A.2d (1967) in which the Supreme Court, limiting the liability of the general contractor, for the injury of a glazier who was injured while glazing windows to liability under the Workmen's Compensation Act.

Were resolution of the factual question of whether plaintiff's work was "a part or process in the trade or business of such principal employer," the only issue, a solution could be sought within these narrow factual confines by possible analogies to these Connecticut cases. However, in all the cases cited thus far there were separate corporate entities involved. We must also consider Connecticut tort law to the effect that where an owner employs an

independent contractor, the contractor--not the owner--is liable in tort until the building has been turned over to the owner. In this case Lewis, as the contractor, would turn the building over to himself as owner. Any such corporate veil in which he sought to enshroud himself to avoid liability, would be so diaphanous as to be easily pierced. Thus the problem is not concerned so much with "trade or business" as with the kind of corporate hat Lewis was wearing at the time of the accident. He had his own derby as owner, his hard-metal helmet as a construction man and his homburg, as a renting agent. And yet under all three hats was the same Harold Lewis. Query, whether, like all Gaul, Lewis can be divided into three parts.

It could not successfully be argued that he would have been protected as owner in tort because control had not been turned over to him by his own construction company. As sole landowner, president and sole stockholder of both companies, he was the only person in control. A parity of reasoning would lead to the conclusion that he was the only "principal employer." It requires extreme indulgence in corporate fiction to hold that in his capacity as an owner he did not enter the construction field when he was hiring (through agents to be sure) sub-contractors.

There is no question but that Lewis and Investors were under a legal obligation to provide plaintiff with a safe place in which to work. As events proved, they did not. The purpose to be served by Workmen's Compensation Acts need not be restated except to mention that they are intended to benefit both employer and employee. The employee receives compensation for his injury without resort to

the courts with attendant delays and uncertainties; the employer by the payment of premiums obtains immunity from litigation. Section 31-291 of the Connecticut General Statutes extends this liability beyond the immediate employer to a "principal employer." The conclusion is unavoidable that the corporate shells used do not obliterate the fact that Lewis was potentially liable (through his corporation) for workmen's compensation arising from the enterprise. Staying within the confines of the corporate fiction plaintiff argues (Trial Memo. p. 12) "LEWIS was the landowner. HOLMDEL was the real estate developer. PLAZA INVESTORS CORP. was the builder. It was not a part or process in the trade or business of LEWIS, landowner, or HOLMDEL, real estate developer, to build a shopping center. That was PLAZA INVESTORS CORP. [sic] function." But that was exactly what Lewis was doing--building a shopping center.

Plaintiff received the benefits created for him by statute, namely, those benefits allowed under the Workmen's Compensation Act. As the Connecticut Court noted in Bello v. Notkins:

> The special purpose of * * * [section 31-291] is to protect employees of minor contractors against the possible irresponsibilities of their immediate employers by making the principal employer who has general control of the business in hand liable as if he had directly employed all who work upon any part of the business which he has undertaken to carry on.

Having received these benefits and there being no factual basis for an independent claim against the defendants, judgment must be awarded in favor of the defendants. Let judgment be so entered.

The foregoing constitutes our findings of fact and conclusions of law pursuant to Rule 52(a), F. R. Civ. P.

Leonard P. Moore
Circuit Judge Sitting by Designation